



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

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Ms. Melissa L. Barloco
Assistant County Attorney
Harris County Attorney
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2003-3695

Dear Ms. Barloco:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 181995.

The Harris County Sheriff (the "sheriff") received a request for certain personnel information pertaining to two named sheriff's deputies. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, 552.117, and 552.130 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted information.

We first note that some of the submitted information constitutes completed investigations that are subject to release pursuant to section 552.022(a)(1) of the Government Code. Section 552.022 makes "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body" public information unless expressly made confidential under other law or "except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Section 552.103 is a discretionary exception under the Public Information Act (the "Act") and is, therefore, not "other law" that makes the completed investigation confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential). Therefore, you may not withhold any of the information in the completed investigations from

¹ Although you did not claim that any portion of the requested information is excepted from disclosure pursuant to section 552.130 of the Government Code within ten business days of the sheriff's receipt of the written request, we will address your claim under this section, since such a claim constitutes a compelling interest sufficient to overcome the existing presumption that any portions of the requested information to which section 552.130 is applicable are now public. *See* Gov't Code §§ 552.301(b), .302; *see also* Open Records Decision Nos. 150 at 2 (1977), 319 (1982).

disclosure under section 552.103 of the Government Code. However, because section 552.022(a)(1) provides that a completed investigation may be withheld under section 552.108, we address your claim under section 552.108 in relation to this information, as well as the other information for which you claim section 552.108.

Section 552.108 provides in pertinent part:

a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from [required public disclosure] if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime;

Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108(a)(1) must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with the detection, investigation or prosecution of crime. *See* Gov't Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You advise that the personnel records of one of the officers named in the request relate to a pending criminal prosecution for homicide. The information you provided indicates that the Houston Police Department investigated the homicide. There is no indication, however, that your office is prosecuting the case. We note that section 552.108 may be invoked by any proper custodian of information which relates to a pending investigation or prosecution. *See, e.g.,* Open Records Decision Nos. 474 (1987), 372 (1983); *see also* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108). You have not represented that the investigative or prosecuting agency has requested that this information be withheld. Therefore, you may not withhold any information under section 552.108.

We now address your claim under section 552.103 in relation to the information not subject to section 552.022. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated

on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To show that the litigation exception is applicable, the city must demonstrate that (1) litigation was pending or reasonably anticipated on the date it received the request and (2) the information at issue is related to that litigation. See Gov't Code § 552.103(a), (c); see also *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

You advise and provide documentation showing that a lawsuit alleging excessive use of force has been filed against Harris County and two sheriff's deputies. One of these deputies is named in the instant request for information. You state that the personnel file of the other deputy named in the request for information contains a disciplinary action letter for an "at fault" fleet incident, and that the "responsive documents involve the same type of deputy acts that are the subject of the pending lawsuit...". The plaintiff's complaint that you have submitted reflects that the lawsuit was filed in federal district court on September 13, 2002, and you indicate that the lawsuit is currently pending. Based on your representations and the information you provided, we find that the sheriff has established that civil litigation was pending when it received this request for information. Further, we conclude that you have demonstrated that some of the submitted information that is at issue relates to the pending litigation for purposes of section 552.103.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all opposing parties in a pending lawsuit is not excepted from disclosure under section 552.103(a), and must be disclosed.² Otherwise, the sheriff may withhold the information that we have marked under section 552.103.

We now address your claims for the remaining information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Criminal history record information ("CHRI") generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential.

² Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090 - .127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. However, we note that section 411.082(2) of the Government Code defines CHRI as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal charges and their dispositions." None of the submitted information is CHRI made confidential under subchapter F of chapter 411 of the Government Code. Therefore, you may not withhold any information under section 552.101 in conjunction with federal law or chapter 411.

We note that section 1703.306 of the Occupations Code provides as follows:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or controls a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The [Polygraph Examiners B]oard or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

(c) A polygraph examiner to whom information acquired from a polygraph examination is disclosed under Subsection (a)(4) may not disclose the information except as provided by this section.

Occ. Code § 1703.306. *See also* Open Records Decision No. 562 at 11 (1990) (polygraph examiner's report confidential pursuant to predecessor statute). The submitted documents include information acquired from polygraph examinations. Subsection (b) requires any governmental body that acquires information from a polygraph examination to keep the information confidential. Occ. Code § 1703.306(b). It appears that none of the exceptions to confidentiality in section 1703.306 applies. *See* Open Records Decision 565 (1990) (construing predecessor statute). Accordingly, the polygraph information that we have marked is confidential pursuant to section 1703.306 of the Occupations Code, and is therefore excepted from disclosure under section 552.101 of the Government Code.

Section 552.101 also encompasses information protected by the common-law doctrine of privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Where an individual's criminal history information has been compiled by a governmental entity, the information takes on a character that implicates the individual's right to privacy. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). In this case, none of the information at issue consists of criminal history information compiled by a governmental entity. Thus, the common-law privacy concerns expressed in *Reporters Committee* do not apply to make any information confidential in this instance.

However, prior decisions of this office have found that financial information relating only to an individual ordinarily satisfies the first requirement of the test for common-law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 373 (1983). For instance, information related to an individual's mortgage payments, assets, bills, and credit history is excepted from disclosure under the common-law right to privacy. *See* Open Records Decision Nos. 545, 523 (1989). On the other hand, information revealing that an employee participates in a group insurance plan funded partly or wholly by the governmental body is not excepted from disclosure. *See* Open Records Decision No. 600 at 10. We have marked information that is protected by common-law privacy and therefore, must be withheld under section 552.101.

Furthermore, section 552.117(2) of the Government Code excepts from public disclosure a peace officer's current and former home addresses, home telephone number, social security number, and information indicating whether the peace officer has family members regardless

of whether the peace officer complies with section 552.024 or 552.1175 of the Government Code. Thus, the sheriff must withhold the information you have marked pursuant to section 552.117, with the exception of the information we have marked for release. We have marked some additional information that must also be withheld under section 552.117.

Finally, section 552.130 excepts from disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Gov't Code § 552.130. Thus, we agree that the sheriff must withhold the Texas license plate, driver's license, and license class information you have marked under section 552.130.

In summary, you may withhold the information we have marked pursuant to section 552.103. You must withhold the personal financial information we have marked under section 552.101 in conjunction with common-law privacy, and must withhold the polygraph information we have marked under section 552.101 in conjunction with section 1703.306 of the Occupations Code. The personal information of one of the deputies that you have marked under section 552.117 must be withheld, with the exception of the information we have marked for release. You must also withhold the additional information we have marked under section 552.117. The license plate, driver's license, and license class information you have marked must be withheld under section 552.130. The remaining requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 181995

Enc. Submitted documents

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